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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

RONALD BROWN,

Defendant and Appellant.

B212971

(Los Angeles County
Super. Ct. No. BA332473)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Frederick N. Wapner, Judge. Affirmed as modified and remanded with directions.

Randy S. Kravis, under appointment by the Court of Appeal, for Defendant and
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Senior Assistant
Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Kenneth C. Byrne
and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

After his motion to suppress evidence was denied under Penal Code section 1538.5,¹ Ronald Brown (appellant) entered a plea of “no contest” to one count of unlawful possession for sale of cocaine base in violation of Health and Safety Code section 11351.5. The trial court placed appellant under terms and conditions of probation for three years.

Appellant appeals on the grounds that: (1) the probation condition that gives the probation officer sole authority to determine where appellant may live is constitutionally overbroad and should be stricken; and (2) the probation condition contained in the minute order of October 14, 2008, which orders appellant to stay away from places where users or sellers congregate and not to associate with drug users or sellers, must be corrected to include a knowledge element.

FACTS

We recite the evidence in the light most favorable to the judgment. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Since appellant entered a plea before trial, we obtain the facts from the transcripts of the preliminary hearing.

Officer Guillermo Avila and other officers of the Los Angeles Police Department went to a hotel at 112 West 5th Street on November 15, 2007, and contacted appellant in apartment No. 468. Officer Avila was assigned to central narcotics. Appellant gave the officers permission to search his room. Officers recovered a clear plastic bindle containing an off-white solid resembling rock cocaine in a cabinet next to the bed. Another container containing numerous such solids was found on a bookshelf. There was also a scale and \$1,088 in cash. Appellant was arrested and taken to the police station in a police car. After appellant got out of the police car, another bindle was found in the back seat where he had ridden. The parties stipulated that subsequent tests showed the solids to contain cocaine base. Officer Avila, based on his training and experience, believed the narcotics were possessed for sale.

¹ All further references to statutes are to the Penal Code unless stated otherwise.

DISCUSSION

I. Probation Condition Governing Appellant's Residence

A. *Appellant's Argument*

Appellant contends that the condition requiring him to “[l]ive in a place the probation officer approves of” is constitutionally overbroad because it gives the probation officer unbridled discretion to decide where appellant may live.

B. *Relevant Authority*

A trial court has broad discretion to impose probation conditions to foster rehabilitation and reformation of the defendant and to protect the public. (§ 1203.1, subd. (j); *Brown v. Superior Court* (2002) 101 Cal.App.4th 313, 319.) The trial court can regulate or prohibit noncriminal conduct in appropriate circumstances and can fashion conditions of probation that impinge on a defendant's constitutional rights. (*People v. Bianco* (2001) 93 Cal.App.4th 748, 752.) Generally, a condition of probation will not be invalidated unless it “(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality” [Citation.]” (*People v. Lent* (1975) 15 Cal.3d 481, 486 (*Lent*), fn. omitted, superseded on another ground as stated in *People v. Wheeler* (1992) 4 Cal.4th 284, 290–295.)

Where a probation condition impinges on a fundamental constitutional right, the condition must not be “impermissibly overbroad.” (*People v. Pointer* (1984) 151 Cal.App.3d 1128, 1139.) Probation conditions have been upheld even though they restrict a probationer's exercise of constitutional rights if they were narrowly drawn to serve the important interests of public safety and rehabilitation (*People v. Keller* (1978) 76 Cal.App.3d 827, 839, disapproved on another point in *People v. Welch* (1993) 5 Cal.4th 228, 237), and if they were specifically tailored to the individual probationer. (*People v. Harrison* (2005) 134 Cal.App.4th 637, 641; *In re Pedro Q.* (1989) 209 Cal.App.3d 1368, 1373; *In re Laylah K.* (1991) 229 Cal.App.3d 1496, 1502.) “[W]hen a condition unquestionably restricts otherwise inviolable constitutional rights, it is properly

subjected to ‘special scrutiny’ to determine whether the limitation, the condition of probation, does in fact serve the dual purpose of rehabilitation and public safety. [Citation.]” (*People v. Keller, supra*, 76 Cal.App.3d at p. 839.)

C. Condition Overbroad

In arguing that the probation condition in question is overbroad, appellant relies on *People v. Bauer* (1989) 211 Cal.App.3d 937 (*Bauer*). As in the instant case, the trial court in *Bauer* required the defendant to obtain his probation officer’s approval of his residence as a condition of probation. (*Id.* at p. 940.) The probation report in *Bauer* stated that the defendant had lived in his family home all his life and was the only one of six siblings to still live with his parents. The report also stated that the defendant had no plans to leave the home because he thought he could be of help to his parents as they grew older. (*Id.* at p. 944.) The *Bauer* court believed the trial court’s interest in appellant’s residence stemmed from defense counsel’s suggestion that the defendant’s immaturity might be the result of living with protective parents and that defendant needed to grow up and be away from them. (*Ibid.*)

Bauer held that the defendant’s close relationship with his parents did not justify disruption of that relationship by a probation officer. (*Bauer, supra*, 211 Cal.App.3d at p. 944.) There was nothing in the probation report or the record as a whole that suggested appellant’s home life contributed to the crimes of which he was convicted (false imprisonment and simple assault) or that it was reasonably related to future criminality. (*Id.* at pp. 940, 944.) Furthermore, living with one’s parents was not in itself criminal. The condition thus failed to meet the *Lent* test, and the condition was therefore unreasonable.

Moreover, according to *Bauer*, the condition impinged on constitutional entitlements of the right to travel and freedom of association. (*Bauer, supra*, 211 Cal.App.3d at p. 944.) The condition was not narrowly tailored to interfere as little as possible with these rights and, in effect, gave the probation officer the power to banish the defendant from his home. (*Ibid.*)

Respondent argues that *Bauer*'s analysis of the condition at issue was fact-specific, and, unlike *Bauer*, the facts in the instant case justify the condition. Appellant sold drugs from his hotel room, and appellant's residence at a hotel reflects a transient lifestyle that has the potential to interfere with the probation officer's need to know appellant's whereabouts. Respondent points out that Officer Avila testified at the preliminary hearing that police made another arrest at the hotel on the same evening as appellant's arrest and on the same floor. According to respondent, the condition is necessary to insulate appellant from a criminal lifestyle, and it is directly related to his rehabilitation. In addition, appellant's residence in a hotel was a threat to public safety because there were many residents.

Clearly, the facts in *Bauer* differ greatly from those we have here. There are certain similarities between this case and *Bauer*, however. In neither of the cases did the probation officer suggest the disputed condition. (*Bauer, supra*, 211 Cal.App.3d at p. 943.) Also, it appears the *Bauer* court was speculating when it sought to determine the trial court's reason for imposing the residence-preapproval condition. We must also speculate, along with respondent, that the reason for the condition in this case related to appellant's selling drugs while living in a downtown hotel.

The need for such a broad condition is not evident from the record in this case. Nowhere in the probation report or the record is appellant's residence cited as a justification for imposing more restrictive probation conditions than those suggested by the probation officer. If the trial court were concerned about appellant having been arrested after selling narcotics from a downtown hotel room, it might have expressed such a concern or attempted to tailor the condition to respond to it. Here, however, the trial court expressed no such concern and gave no reasons for imposing this condition in lieu of condition No. 15 suggested by the probation officer, i.e. "Keep probation officer advised of your residence at all times."

In addition, the relationship between living in a hotel and selling narcotics is tenuous. Although Officer Avila implied that the downtown Los Angeles area was

known for narcotics sales, the fact that appellant lived in a hotel in that area was not directly related to his crime. There were 600 rooms in the hotel, and although the officers arrested a second suspect on appellant's floor, it is unlikely that the majority of the residents were drug sellers and users.

With respect to future criminality, just as it is proper to restrict a probationer from contact with persons who might be "a source of temptation to continue to pursue a criminal lifestyle" (*People v. Lopez* (1998) 66 Cal.App.4th 615, 626), knowing where defendant resides is clearly necessary in order to properly supervise him and aid in his rehabilitation. The probationer must be subject to visits and to searches, not only to determine whether he or she disobeys the law, but also whether he or she obeys the law. (*People v. Reyes* (1998) 19 Cal.4th 743, 752.) A condition that requires a probationer to advise the probation officer of his address and any changes in residence within a certain number of days would appear to accomplish this task. "If available alternative means exist which are less violative of a constitutional right and are narrowly drawn so as to correlate more closely with the purpose contemplated, those alternatives should be used [Citation.]" (*In re White* (1979) 97 Cal.App.3d 141, 150.)

As *Bauer* noted, the residence-approval condition restricts appellant's right to travel and his freedom of association. "Rather than being narrowly tailored to interfere as little as possible with these important rights, the restriction is extremely broad." (*Bauer, supra*, 211 Cal.App.3d at p. 944.) As in *Bauer*, the probation condition at issue here gives appellant's probation officer the power to prevent defendant from living anywhere the officer decides is unsuitable—reasonably or unreasonably. This includes living with appellant's family, or with his girlfriend, in whose home appellant claimed to be living when he spoke to the probation officer. As in *Bauer*, appellant could be effectively banished. "[A] sentencing court does not have this power." (*Id.* at pp. 944–945.)

We believe that the fostering of appellant's rehabilitation will not be significantly improved by requiring preapproval by the probation department of any residence appellant might choose. The cumbersome and potentially arbitrary nature of such a

condition cannot be justified by the fact that appellant was found to be selling drugs from a hotel room rather than on a street corner or from an apartment or a single family home. “‘. . . The Constitution, the statute, all case law, demand and authorize only “reasonable” conditions, not just conditions “reasonably related” to the crime committed.’ [Citation.]” (*In re White, supra*, 97 Cal.App.3d at p. 146.) Under the circumstances of this case, the condition at issue is overbroad and must be stricken.

II. Inconsistency in Minute Order

Appellant points out that the minute order from his sentencing states that he was ordered to “stay away from places where users or sellers congregate” and not to “associate with drug users or sellers unless attending a drug treatment program.” Appellant contends that the minute order should be corrected by this court because these conditions are different than those set out in the oral pronouncement of judgment, where the court stated: “You can’t associate with people who you know use or sell drugs or be in places where they are unless you’re attending a drug education or treatment program.”

“A condition of probation that prohibits appellant from associating with persons who, unbeknownst to him, have criminal records or use narcotics, is “overbroad [and therefore] is not reasonably related to a compelling state interest in reformation and rehabilitation and is an unconstitutional restriction on the exercise of fundamental constitutional rights.” [Citation.]” (*People v. Garcia* (1993) 19 Cal.App.4th 97, 102.) Respondent does not dispute that a knowledge element must be included in the conditions at issue, but contends there is no need to correct the minute order because the oral pronouncement already contains the knowledge requirement.

Although an oral pronouncement of judgment controls over the clerk’s minute order (*People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2; *People v. Mitchell* (2001) 26 Cal.4th 181, 183, 185–188), it is prudent that the minute order of judgment accurately reflect the oral pronouncement of judgment, the transcript of which may not always be available to appellant or his representative. And, even though an overbroad probation condition may be modified to add the element of knowledge and affirmed as modified

(*People v. Lopez, supra*, 66 Cal.App.4th at p. 629), in this case we must remand the matter to the superior court in any event. Therefore, we will direct the superior court to modify the condition as written on the minute order to include a knowledge element.

DISPOSITION

The judgment is modified to amend the minute order of judgment to conform to the oral pronouncement of judgment, i.e., to provide that appellant must “not use or possess any narcotics, dangerous or restricted drugs or associated paraphernalia, except with a valid prescription and stay away from places where users or sellers *are known to* congregate. Do not associate with *known* drug users or sellers unless attending a drug treatment program.” Also, the condition requiring appellant to “[m]aintain residence as approved by the probation officer” is stricken, and the trial court is directed to replace this condition with a more narrowly tailored condition that would allow the probation officer to track appellant’s residence. In all other respects, the judgment is affirmed. The superior court is directed to amend the minute order to include the conditions as corrected.

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_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ